(2)

No. 89-1226

IN THE

Supreme Court Of The United States

October Term, 1989

JAMES GEORGE WALKER,

Petitioner,

v.

SUBURBAN HOSPITAL ASSOCIATION, JOAN FINNERTY, PAUL QUINN, JAMES GARY, BERNADETTE WELCH, CHARLES STEWART, LLOYD GREENE, DALTON WILLIAMSON, ERIC E. JOHNSON, HEIDI CHRISTLE MARCHAND and ASTER HAILU

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondents Suburban Hospital Association, et al.,[1] through their undersigned counsel, now state their opposition to the Petition for Writ of Certiorari filed by James George Walker on January 31, 1990. The Petition for Writ of Certiorari should be denied for the following reasons:

(1) The decision of the Fourth Circuit Court of Appeals affirming dismissal of Petitioner's claims is not in conflict with the decision of any other federal court of appeals;

(2) The decision of the Fourth Circuit Court of Appeals affirming dismissal of Petitioner's claims did not decide an important question of federal law which needs to be settled by this Court or which is in conflict with applicable decisions of this Court; and

(3) Petitioner has failed to set forth the points he claims require consideration by this Court with "accuracy, brevity and clearness" so as to facilitate a "ready and adequate understanding" of the alleged grounds for granting the Petition.

[1] The original parties are as indicated on the title page. Respondent Suburban Hospital Association has no corporate affiliates.

STATEMENT OF THE CASE

A. Course of Proceedings Below

Petitioner James G. Walker (hereinafter "Petitioner" or "Mr. Walker") filed his Amended Complaint in this matter on April 24, 1986, bringing eight causes of action against his former employer Suburban Hospital Association and several administrators and supervisors at Suburban Hospital. On May 26, 1987, the United States District Court for the District of Maryland dismissed the entire action. (*See* Appendix D to the Petition for Writ of Certiorari.) The District Court adopted the Reports and Recommendations issued by United States Magistrates Daniel E. Klein, Jr. on February 27, 1989 (Magistrate Klein's opinion is set forth in Appendix A herein at pp. 1a-8a) and by Deborah K. Chasanow on April 29, 1987. (Magistrate Chasanow's 1987 opinion is set forth in Appendix B herein at pp. 1b-4b).

Petitioner appealed the 1987 dismissal of his claims to the United States Court of Appeals for the Fourth Circuit. On March 25, 1988, the Court of Appeals reversed the District Court's decision with respect to Petitioner's 42 U.S.C. § 1981 discrimination claim and his pendent state causes of action for breach of contract and exposure to carcinogenic substances. (*See* Appendix E to the Petition for Writ of Certiorari). The Court of Appeals overturned the District Court's judgment that Petitioner's suit under Title VII precluded a simultaneous suit under § 1981 and held instead that Title VII did not provide the exclusive remedy for Petitioner's discrimination claims.

Following the Fourth Circuit's remand, Respondents answered the Amended Complaint and took Petitioner's deposition. Respondents filed a motion for summary judgment on October 14, 1988. On December 13, 1988, United States Magistrate Deborah K. Chasanow recommended that Respondents' motion for summary judgment be granted as to Petitioner's § 1981 claim and as to Petitioner's contract claim or, in the alternative, that the contract claim be dismissed along with the tort claim because the District Court need not exercise jurisdiction over Petitioner's pendent state claims. (*See generally*, Report and Recommendation of Magistrate Chasanow set forth herein as Appendix C at pp. 1c-20c). On December 27, 1988, United States District Court Judge Joseph C. Howard affirmed and adopted the

Magistrate's recommendations including the Magistrate's suggestion that summary judgment be granted to Respondents on Petitioner's contract claim. (*See* Judgment Order of United States District Court Judge Joseph C. Howard as set forth in Appendix W to the Petition for Writ of Certiorari).

Again, Petitioner appealed the dismissal of his Amended Complaint. On September 19, 1989, the Fourth Circuit Court of Appeals affirmed the District Court's dismissal of Petitioner's claims "on the basis of the well-reasoned opinion of the District Court" and the Supreme Court's decision in *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S. Ct. 2363 (1989). (*See* Appendix Z to the Petition for Writ of Certiorari). The Fourth Circuit held that Petitioner's starting salary claim and his shift differential claim were cognizable under § 1981 because these discrimination claims related to conduct in the formation of the initial contract terms. (*See* Appendix Z to the Petition for Writ of Certiorari, pp. 110a-111a). The Court of Appeals concluded, however, that the District Court had correctly dismissed Petitioner's starting salary and shift differential claims because Petitioner had failed to rebut the "legitimate, non-discriminatory reasons" offered by Suburban Hospital for paying Petitioner a lower starting salary than certain white pharmacists and for paying him a night shift differential that was less than that paid to nurses on the night shift. (*Id.*)

With respect to Petitioner's claim that he was unfairly disciplined because of his race in violation of § 1981, the Court of Appeals held that the Court's decision in *Patterson v. McLean Credit Union* warranted dismissal of this portion of Petitioner's action because the Court stated in *Patterson* that § 1981 does not prohibit "conduct after the contract relation has been established, including breach of the terms of the contract and imposition of discriminatory working conditions". (*See* Appendix Z to the Petition for Writ of Certiorari, pp. 111a - 112a). The Court of Appeals also affirmed the District Court's conclusion that the language of Petitioner's employment contract "clearly refuted" Petitioner's breach of contract claim. Finally, the Fourth Circuit concluded that the District Court properly refused to review the merits of Petitioner's "exposure to carcinogens" claim because it was based on facts "wholly independent of all the

other claims". (*See* Appendix Z to Petition for Writ of Certiorari, p. 112a).

Petitioner's petition for rehearing and suggestion for rehearing in banc was denied on November 26, 1989. (*See* Appendix CC to the Petition for Writ of Certiorari).

B. Relevant Facts Underlying Dismissal of Petitioner's Claims

Petitioner has set forth a distorted statement of facts in his Petition. The facts which were relevant to the District Court's initial dismissal of Petitioner's complaint in 1987 and its subsequent grant of summary judgment to Respondents in 1989 are set forth in detail in the Reports and Recommendations of Magistrate Chasanow. (*See* Appendix B and Appendix C herein at pp. 1b-2b and pp. 5c-19c respectively). These facts are summarized below:

James G. Walker applied for employment at Suburban Hospital on March 23, 1984. The Hospital is a private non-profit corporation which has received federal funds as a result of its participation in the Hill-Burton Act construction program. It also receives funds in the form of medicare and medicaid payments.

At the time of Petitioner's application for employment as a pharmacist, Suburban Hospital had been advertising for a pharmacist to work full time nights. It sought a pharmacist with hospital experience including experience with I.V. admixture, TPN mixing and the unit dose system ("UD"). The Hospital wanted candidates for the night pharmacy position with previous hospital experience rather than "drug store" experience.

In 1984, Suburban Hospital applied a salary scale to each position at the Hospital. This scale was divided into eight octiles by which employees were assigned starting salaries according to their experience and level of education. In evaluating Petitioner's qualifications and assigning a starting salary, the Hospital noted that Mr. Walker had only three months hospital experience as a pharmacist.

The Hospital paid Mr. Walker and other night pharmacists a shift differential for working on the night shift. The shift differential paid to the pharmacists was less than that paid to the nurses and LPNs working on the night shift because the Hospital was having a hard time

recruiting nurses for the night shift. Thus, the Hospital offered the higher incentive to recruit and retain nurses for the night shift work.

When Mr. Walker began his employment on the Hospital's night shift, he signed an employment agreement relating to his hours of work on the night shift. This agreement included a 30 day notice provision whereby the Hospital agreed to give the employee a minimum of 30 days notice if it decided to discontinue the scheduling set forth in the night pharmacist agreement. This agreement did not cover grounds for employee discipline, suspension or discharge. (*See* "Employment Agreement-Night Pharmacist" set forth as Appendix Q in the Petition for Writ of Certiorari at pp. 63a - 64a).

On January 8, 1986, Petitioner was disciplined for refusing to code an I.V. card after being ordered to do so by his supervisor, Eric Johnson. Although Mr. Walker believed that the coding was "just paperwork" and "flunky work", the coding was used to generate the charges for the I.V.'s prepared by the pharmacists and was necessary for billing purposes. His supervisors had circulated memoranda on the importance of coding and held meetings regarding coding.

Mr. Walker went to another supervisor, Dalton Williamson, and complained about having to do the coding. Mr. Williamson responded that Mr. Walker would have to do his own coding and he would also have to do what Mr. Johnson said. Mr. Walker's response to Mr. Williamson was: "In a pigs eye. It will be coded when you all do it."

The next day, Mr. Walker was called to Mr. James Gary's office, the Director of Pharmacy, where he, Dalton Williamson and Mr. Gary discussed his conduct on the previous day. Mr. Gary told him that he would have to do the coding and would have to listen to what Eric Johnson said and if there were any problems, to bring the problems up to him. After an exchange of "words", Mr. Walker told Mr. Gary that he was not going to do as he was told.

On February 19, 1986, Petitioner was placed on probation for continuing to refuse to perform his job responsibilities and insubordination. Petitioner was not clocking in orders as required by pharmacy procedure and he was not dispensing medication to the patients of the Hospital on a timely basis. The memorandum placing Petitioner on probation also discussed the fact that he was still failing to do the coding and other paperwork at night. The probation memorandum

memorialized Mr. Walker's refusal to complete profiling procedures and check I.V. Admixture solutions that were compounded on his shift. The probation memorandum instructed Mr. Walker to begin following all policies and procedures of the department including clocking in physician orders, profiling all medicine orders correctly on the I.V. charge profile card, and following the orders and instructions of his supervisors. Mr. Walker refused to sign the probation memorandum and told his supervisors that he was not going to take any more orders from them.

The very next day, Petitioner was suspended for four days when he did not check the I.V. solutions that were compounded on his evening shift. Mr. Walker admits that he did not check the I.V.'s but claimed he was too busy. He told his supervisors: "[G]o back and check it [your]selves".

On February 25, 1986, Petitioner was sent a registered letter confirming his suspension and notifying him that he was to return to work on March 3, 1986. Petitioner received the registered letter on February 27, 1986. Petitioner did not return for work on March 3rd, nor did he notify anyone at Suburban Hospital that he would not be returning to work. When he did not report for work, he was terminated for abandoning his job.

ARGUMENT

A. Petitioner Has Failed to Clearly Articulate Reasons Which Would Justify Granting the Writ.

As mentioned above, the Petition for Writ of Certiorari fails to set forth the reasons underlying Petitioner's request for a writ in a manner that allows a clear understanding of the points requiring consideration by the Court. This deficiency is in itself grounds for a denial of the writ. *See* Rule 21.5 of the Supreme Court Rules. Petitioner appears to be asking the Court to make a determination as to the merits of his claims rather than review the application of law underlying the Fourth Circuit's decision in this case. The jurisdiction of the Supreme Court cannot be invoked in the manner proposed by Petitioner.

Respondents concede that the section in the Petition entitled "Reasons for Granting the Writ" contains a "laundry" list of constitu-

tional provisions and federal statutes which Petitioner apparently claims were misapplied by the District Court and the Court of Appeals. As will be demonstrated below, however, none of Petitioner's claims in this respect merit review by the Court in this case.

B. The Fourth Circuit's Decision In This Case Is Not In Conflict With Other Decisions By Federal Courts Of Appeals Or With Decisions Of The Supreme Court.

Petitioner claims that the Fourth Circuit's decision is in conflict with a recent decision by the United States Court of Appeals for the District of Columbia. He also claims the Court of Appeals' affirmance of the District Court's decision in this case was in error because the District Court's decision was at variance with certain decisions of the Supreme Court. In each instance, Petitioner fails to establish any such conflict.

1. There is No Conflict Between the Fourth Circuit's Decision in this Case and the Decision of the Court of Appeals for the District of Columbia in *Tatum v. Hyatt Hotels Corporation.*

Petitioner argues that the Court of Appeal's decision in this case is in conflict with an unpublished decision of the Court of Appeals for the District of Columbia Circuit captioned *Tatum v. Hyatt Hotels Corp., et al.*, No. 89-7032 (D.C. Cir. Oct. 6, 1989). (*See* Appendix BB in the Petition for Writ of Certiorari). As explained above, the Fourth Circuit applied the Court's rationale in *Patterson v. McLean Credit Union* to affirm the dismissal of Petitioner's claim that he was unfairly disciplined because of his race in violation of 42 U.S.C. § 1981. The Fourth Circuit's opinion correctly applied the *Patterson* decision because the discriminatory conduct claimed by Petitioner occurred after the contractual relationship had been established and therefore was not actionable under § 1981. The Court in the *Patterson* decision stated that § 1981 does not prohibit "conduct after the contract relation has been established, including breach of the terms of the contract and imposition of discriminatory working conditions". 109 S. Ct. at 2373.

The District of Columbia Circuit's decision cited by Petitioner did not apply the Court's *Patterson* decision in a manner which is in conflict with the Fourth Circuit Court of Appeals' decision in this case.

In fact, the District of Columbia Court of Appeals' decision did not apply *Patterson* at all but merely directed a remand of the case at issue for a decision by the district court "in light of *Patterson v. McLean Credit Union*". (*See* Appendix BB in the Petition for Writ of Certiorari, p. 121a).

Further, it appears from the materials contained in Appendix BB to the Petition that the *Tatum v. Hyatt Hotels Corp.* case involved a hairstyle policy in place at the time of the hiring of the plaintiff/employees by Hyatt Hotels Corporation. Therefore, even assuming that the District of Columbia district court concluded that a discharge for violation of the hotel's hairstyle policy was cognizable under § 1981, such a decision would not be in conflict with the Fourth Circuit's application of *Patterson* to the claim of discriminatory discipline by Petitioner in this case.

2. There is No Conflict Between *Patterson v. McLean Credit Union* and *Meritor Savings Bank v. Vinson.*

Petitioner claims the Court should clarify its decision in *Patterson v. McLean Credit Union* with its decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), but he fails to illustrate where the conflict exists. In fact, no clarification is needed.

Patterson v. McLean Credit Union involved a ruling by the Court that racial harassment was not cognizable under 42 U.S.C. § 1981. The Court's decision in *Meritor Savings Bank v. Vinson* involved a claim of sexual harassment under Title VII. There is absolutely no conflict between these decisions. The *Patterson* decision explicitly states that a claim of racial harassment is properly brought under Title VII and not § 1981. There was no § 1981 claim at issue in the *Meritor Savings Bank v. Vinson* decision. Thus, Petitioner's claim that there is a need to "clarify" a conflict between these two decisions is specious.

3. There Is No Conflict Between The Decision In This Case And *Hishon v. King & Spalding.*

Petitioner argues that the District Court's grant of summary judgment in this case is at odds with the Supreme Court's opinion in *Hishon v. King & Spalding*, 467 U.S. 69 (1984). Specifically, Petitioner makes reference to the Court's statement that "a benefit that

is part and parcel of the employment relationship may not be doled out in a discriminatory fashion..." Id. at 75. The District Court's conclusion in this case that there was no discrimination in the payment of starting salary or shift differential by Suburban Hospital can not be construed as a failure to recognize the principle elucidated by the Court in *Hishon* that discrimination can be made out by the uneven application of benefits. Rather, the District Court determined, as it had a right to do under Rule 56 of the Federal Rules of Civil Procedure, that Petitioner had not established that there was a genuine issue of material fact in dispute with respect to Suburban Hospital's application of wages and benefits to its employees.

The District Court found that Suburban Hospital did not discriminate in payment of a starting wage and shift differential. Thus, the District Court's opinion and the Fourth Circuit's affirmance of that decision, is consistent with, and not contrary to, the rationale in *Hishon v. King & Spalding*. The Magistrate addressed Petitioner's reference to *Hishon v. King & Spalding* in her decision, stating: "There is nothing in [the *Hishon* case] to contradict the reasoning set forth above. Plaintiff has failed to show that he was similarly situated with those who received higher starting salaries." (*See* Appendix C herein, at p. 9c).

4. There is No Conflict Between the Decision in This Case and *Watson v. Fort Worth Bank and Trust.*

Petitioner's citation to *Watson v. Fort Worth Bank and Trust*, ___ U.S. ___, 108 S. Ct. 2777 (1988), and the Court's conclusions therein with respect to disparate impact analysis under Title VII, has no application to Petitioner's claims under 42 U.S.C. § 1981. The District Court correctly found that § 1981 can only be violated by purposeful discrimination and it does not reach disparate effects alone. (*See* Appendix C herein, at p. 5c, n. 4, *citing General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390-91 (1982)). Additionally, although the District Court conceded that "disparate impact may be relevant to a § 1981 claim", (*Id.*), Petitioner made no attempt to establish a statistical disparity between the racial composition of pharmacists at Suburban Hospital as compared with nurses and LPN's at the Hospital. Additionally, as noted by the Court of Appeals:

"The Hospital legitimately offered more money for *nurses* because of a shortage of nurses available to work the night shift and Walker has not rebutted this explanation with any allegation or proof." (*See* Appendix Z to the Petition for Writ of Certiorari, p. 111a).

Thus, even if a disparate impact analysis had been applied to Petitioner's claims, the facts below establish that Suburban Hospital's shift differential policy "serves, in a significant way, the legitimate employment goals of the [Hospital]". *See Wards Cove Packing Co., Inc., v. Atorio*, ___U.S.___ , 109 S. Ct. 2115, 2125-26 (1989) *citing Watson v. Fort Worth Bank & Trust* Co., ___ U.S. ___, 108 S. Ct. 2777 (1988). "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Id.* at 2126, *citing Watson*. The Court of Appeals concluded that Petitioner did not carry his burden of persuasion. This conclusion would be correct under any theory of discrimination and the Court of Appeals' opinion is therefore consistent with the *Watson v. Fort Worth Bank and Trust Co.* decision.

5. There is No Conflict Between the Decision in This Case and *Martin v. Wilks*

Petitioner makes reference to the "Birmingham, Alabama Firefighters Case" and claims that the District Court's decision conflicts with the "tenet of law" allegedly established in that case, i.e., that "blacks who had less seniority could not be promoted over whites who had more seniority". (*See* Petition, pp. 6-7). He alleges that he had more "seniority" than white pharmacists and thus should have been paid a higher base salary.

Respondents assume that Petitioner is referring to the Court's decision in *Martin v. Wilks*, ___U.S.___, 109 S. Ct. 2180 (1989), when he "cites" the "Birmingham, Alabama Firefighters Case". The *Martin v. Wilks* decision stands for the principle that a consent decree between an employer and certain minority employees providing for affirmative action in hiring and promoting the minority employees could be challenged by non-minority employees in a reverse discrimination suit. The decision involves an analysis of proper judicial procedure and not the substantive rights of more "senior" employees *vis-a-vis* less "senior" employees. There is absolutely no conflict between the *Martin v. Wilks* decision and the instant case.

Furthermore, Petitioner raises the issue of "seniority" even though his seniority or his eligibility for a promotion were not even at issue in this litigation. Petitioner's discrimination claim involved an allegation that the starting salary paid to Petitioner at Suburban Hospital discriminated against him because of his race. The term "seniority", however, relates to years of service with Suburban Hospital and it had absolutely nothing to do with the Hospital's determination as to what starting salary to give new employees. Suburban Hospital determined its starting rates for new pharmacists by crediting hospital experience at other institutions and evaluating the degree of pharmacy education each applicant possessed. The Magistrate characterized the Hospital's practice as "an entirely reasonable manner of setting starting salaries" and "a common practice in the business world". (*See* Appendix C herein, pp. 7c-8c). There was absolutely no allegation in this litigation that Petitioner was given a lower raise than other pharmacists as he progressed through the salary scale. Petitioner raises the seniority issue simply because he could not rebut the clear evidence that all the white pharmacists he points to as having received a higher starting salary also possessed considerably more hospital experience than Petitioner while others possessed doctorate degrees which he had not obtained. The Court should not review the Fourth Circuit's decision in this case on the basis of this "phantom" issue of seniority.

C. The District Court's Dismissal of Claims Based on 42 U.S.C. §§ 1982, 1983 and 1985, Title VII and the Fifth and Fourteenth Amendments was not in Conflict with Applicable Decisions of the Supreme Court.

As mentioned, all of Petitioner' claims were dismissed in May, 1987. (*See* Appendix D to the Petition for Writ of Certiorari and Appendix A and B herein). The Court of Appeals, on March 25, 1988, reversed only as to Petitioner's § 1981 and pendent state claims. Petitioner now makes a rather oblique and convoluted attack on the reasoning of the District Court in an attempt to revive his Title VII claim, his claims under 42 U.S.C. §§ 1982, 1983 and 1985 and his claims under the fifth and fourteenth amendment. As argued below, the dismissal of these claims was consistent with applicable law.

1. Petitioner's 42 U.S.C. § 1982 Claim Was Clearly Insufficient as a Matter of Law.

The District Court properly found Petitioner's § 1982 claim to be legally inapplicable. It is well established that the limited purpose of § 1982 is to provide a cause of action for racial discrimination in the sale, leasing and inheritance of real and personal property. *Jones v. Mayer Co.*, 392 U.S. 409, 420 (1968). It is not an appropriate jurisdictional foundation for an employment discrimination claim. *Abel v. Bonfanti*, 625 F. Supp. 263, 269 (S.D. N.Y. 1985). Petitioner's claim that "property denotes a broad range of interest" so as to allow § 1982 to encompass the payment of wages is unsupported by applicable law.

2. The Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 Cannot Support a Cause of Action Where State Action is Not Present.

Petitioner's claims under 42 U.S.C. § 1983 and under the fifth and fourteenth amendments to the United States Constitution were also properly dismissed by the District Court without reaching the merits of Petitioner's allegations. A requisite element for maintaining a cause of action based upon 42 U.S.C. § 1983 and the fifth and fourteenth amendments is government action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *Nixon v. Condon*, 286 U.S. 73, 83 (1932); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Petitioner's Amended Complaint was completely devoid of any factual allegation or legal foundation demonstrating this "state action."

Although Petitioner asserted that the receipt of federal funds created sufficient governmental affiliation to make Suburban Hospital a state actor, this argument was contrary to settled case law. *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982); *Carter v. Norfolk Community Hospital Ass'n*, 761 F.2d 970, 972 (4th Cir. 1985); *See also Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978) *cert. denied*, 442 U.S. 947 (1979) (Receipt of medicare and medicaid funds does not fulfill the state action requirement for claims based on § 1983, fifth and fourteenth amendments). Thus, the Fourth Circuit's affirmance of the District Court's dismissal of Petitioner's § 1983 claim and his claims under

the fifth and fourteenth amendments is consistent with applicable decisions of the Supreme Court.

3. Petitioner's Claim Based On 42 U.S.C. § 1985 Was Not Well Grounded in Fact Nor Warranted By Existing Law

Petitioner's assertion that 42 U.S.C. § 1985 provided jurisdiction for his discrimination claims was patently frivolous. His Amended Complaint lacked any specific facts which might substantiate his § 1985 conspiracy claim. Petitioner pled no facts showing either the nature or the purpose of the conspiracy, nor did he assert any overt acts taken in furtherance of the conspiracy, nor did he show the deprivation of rights which resulted because of the conspiracy. Merely asserting a conspiracy without the requisite facts and details of a conspiracy is completely inadequate to support a § 1985 claim. *Picking v. State Finance Corp.*, 332 F. Supp. 1399, 1402-03 (D. Md. 1971). This cause of action was correctly dismissed by the District Court.

4. Petitioner Did Not Exhaust His Administrative Remedy Prior to Filing His Title VII Claim and Thus, it was Properly Dismissed.

The District Court correctly ruled that it had no jurisdiction to decide Petitioner's Title VII claim where Petitioner did not exhaust his administrative remedy prior to bringing suit. (*See* Appendix A herein, p. 6a and Appendix D to the Petition for Writ of Certiorari, pp. 12a & 14a). Petitioner clearly failed to satisfy the statutory prerequisite for bringing a Title VII action in federal court. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Petitioner's citation to *Bowen v. City of New York*, 476 U.S. 467 (1986), as support for a "bypass of exhausting administrative remedies" is specious.

D. The District Court's Decision to Grant Summary Judgment to Respondents on Petitioner's § 1981 Discrimination Claims, on his Breach of Contract Claim and on his Tort Claim is not in Conflict with Applicable Decisions of This Court.

The District Court found Petitioner's § 1981 discrimination claims, his breach of contract claim, and his tort claim to be totally without merit. The Court of Appeals agreed with the District Court's

appraisal of Petitioner's claims in its opinion issued September 19, 1989. Petitioner's attack on the reasoning of the courts below does not establish that either the decision of the District Court or the Court of Appeals was in conflict with applicable laws.

1. Petitioner Failed To Make Out A Prima Facie Case of Discrimination Under 42 U.S.C. § 1981.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court outlined the general requirements for establishing a *prima facie* case of employment discrimination in hiring. Petitioner was unable to make out a *prima facie* case of racial discrimination in proceedings before the District Court. In ruling on Respondents' Motion for Summary Judgment, Magistrate Chasanow found Petitioner's evidence to be a "meager attempt to establish a *prima facie* case of employment discrimination." (*See* Appendix C, at p. 3c.) After a thorough inquiry into the substance of Petitioner's allegations, the Magistrate concluded: "Plaintiff's unsupported allegations...cannot stand." (*Id.*)

Specifically, Petitioner's assertion that his starting salary was indicative of discrimination because it was lower than other new hires was found to be groundless. The Magistrate stated: "Plaintiff has failed to show that he was similarly situated to the white pharmacists who were hired after him and who received higher salaries." (*Id.* at 6c.) Additionally, the Magistrate concluded that the evidence submitted by Petitioner did not establish that Respondents' reasons for their actions were a pretext for discrimination. (*Id.* at 7c.) The Court of Appeals agreed with the Magistrate stating that "Walker failed to rebut the hospital's substantial showing that he was paid a lower salary because he had minimal previous hospital experience and because he, unlike three other pharmacists, did not have an advanced pharmacy degree." (*See* Appendix Z in the Petition for Writ of Certiorari, at p. 111a.)

Likewise, Petitioner failed to satisfy his burden of establishing a *prima facie* case of discrimination with respect to his night differential pay claim. (*See* Appendix C herein, at p. 10c.) Petitioner was paid shift differential for working the night shift, but registered nurses received higher night differential than did pharmacists. The Magistrate found that Petitioner's assertion that this was a racially discriminatory practice was without merit. The Magistrate said: "Nur-

ses and pharmacists...are not performing the same duties and cannot be considered similarly situated". (*Id.* at 12c.) The Court of Appeals also found that Petitioner's shift differential claim failed because he had not rebutted the Hospital's showing that nurses were offered more money to work the night shift because of a shortage of nurses. (*See* Appendix Z in the Petition for Writ of Certiorari at p. 111a.)

Petitioner's allegations of discriminatory discipline and discharge were also devoid of factual support. The Magistrate said: "The first and foremost reason that Plaintiff cannot prove a discriminatory discharge is that he was not discharged and his suspension was not a constructive discharge." (*See* Appendix C herein, at p. 13c.) The Magistrate also found that Petitioner's claim that his suspension was motivated by discrimination was successfully rebutted by Respondents: "The record is replete with evidence of Plaintiff's admitted insubordination towards his supervisors and his deliberate disregard of hospital policies". (*Id.* at 14c.)

Thus, as revealed through Magistrate Chasanow's analysis, the record clearly demonstrated that Petitioner's § 1981 claim was factually groundless, containing only conclusory allegations, and ultimately failing in its attempt to establish a *prima facie* case of discrimination. The District Court's decision to grant summary judgment to Respondent on Petitioner's § 1981 claims was consistent with applicable decisions of the Court. The Court of Appeals decision, based as it is on the reasoning of the District Court and a correct application of *Patterson v. McLean Credit Union*, should not be reviewed by the Court.

2. Petitioner's Breach of Contract Claim was Properly Dismissed by the District Court.

Magistrate Chasanow examined the factual basis for Petitioner's breach of contract cause of action and found it based on an erroneous premise that he had a contract with Suburban Hospital that entitled him to 30 days notice prior to suspension. The Magistrate found that the plain language of the documents upon which Petitioner relied for his contract claim "categorically refuted any contention that a contractual employment relationship existed between Plaintiff and Suburban Hospital." (*See* Appendix C, herein at p. 19c.) The Hospital's reservation of its right to discontinue the alternating workweek schedule

upon thirty (30) days notice in the Night Pharmacist Employment Agreement could not reasonably be construed to require notice to individuals suspended for insubordination and violations of Hospital policy. The Court of Appeals' affirmance of the District Court's findings on the contract claim was a proper exercise of its appellate jurisdiction. (*See* Appendix Z to the Petition for Writ of Certiorari, p. 112a).

3. The District Court Properly Applied the Doctrine of Pendent Jurisdiction in Dismissing Petitioner's Tort Claim.

Magistrate Chasanow concluded that Petitioner's tort claim did not meet the test set out in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), for the exercise of pendent jurisdiction. (*See* Appendix C herein, at p. 19c.) Petitioner had alleged that he was exposed to carcinogens during his employment at Suburban Hospital and he sued "for the speculative possibility that this exposure may cause him to get cancer, or may adversely affect any children he may have in the future." (*Id.*) The Magistrate concluded that this tort claim had an "insufficient connection" with Petitioner's § 1981 claims. (*Id.*)

The Court of Appeals agreed with the Magistrate's reasoning, perceiving "no common facts between [the tort] claim and Walker's federal claims". (*See* Appendix Z to the Petition for Writ of Certiorari, p. 112a). Nothing contained in the Petition even remotely demonstrates a nexus of common facts between the tort claim and Petitioner's other claims. Thus, the decision to dismiss was consistent with applicable decisions of the Supreme Court and it should not be reviewed by way of a Petition for Certiorari.

CONCLUSION

For all the foregoing reasons, the Court should deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,
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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES GEORGE WALKER

v.

SUBURBAN HOSPITAL ASSOCIATION, ET AL

CIVIL ACTION NO.: JH-86-962

MEMORANDUM AND ORDER

On March 24, 1986, plaintiff, James George Walker filed a *pro se* civil action naming as defendants Suburban Hospital Association [Suburban], Joan Finnerty, Paul Quinn, James Gary, Bernadette Welch, Charles Stewart, Lloyd Green, Dalton Williamson, Eric Johnson, Heidi Marchand, and Aester Hailur. By virtue of an order dated April 7, 1986, plaintiff was required to amend his complaint to set forth the bases for this Court's jurisdiction and to particularize one of his claims. (Paper No. 2). Plaintiff filed his amended complaint on April 16, 1986, stating that his claims arise under 42 U.S.C. §§1981, 1982, 1983, and 1985, the Fifth and Fourteenth Amendments, and 42 U.S.C. § 2000e. (Paper No. 3). On May 27, 1986, defendants filed a motion to dismiss (Paper No. 6), to which plaintiff responded on June 2, 1986. (paper No. 8). Also pending are defendants' motion to compel discovery (paper No. 18). No hearing is deemed necessary. Local Rule 6.

In his amended complaint, plaintiff alleges the following course of events:

1. On May 16, 1984, plaintiff, a black male, signed a contract with defendant Suburban for employment as a night pharmacist. The contract provided that defen-

dant Suburban would have to provide plaintiff with thirty days notice before dismissal.

2. On August 13, 1984, defendant Suburban hired defendant Marchand, a white female, at a higher salary than plaintiff. Later, defendant Marchand was given a retroactive pay raise.

3. On March 20, May 30, July 15, and September 9, 1985, other white pharmacists were hired by defendant Suburban at higher pay rates than plaintiff.

4. On September 23, 1985, plaintiff wrote to defendant Gary about the hazards of working with carcinogens and about certain pay disparities.

5. On October 30, 1985, defendant Marchand put an accusatory statement in plaintiff's file, and plaintiff was not given an opportunity for rebuttal.

6. On January 8, 1986, defendant Johnson advised plaintiff to place codes on cards. Plaintiff asked a technician to do it, and she refused. When he reported the incident to defendant Williamson, plaintiff was told that plaintiff was not the technician's boss and that plaintiff must code the cards.

7. On January 9, 1986, plaintiff met with defendants Gary and Williamson. Defendant Gary refused to hear evidence about other pharmacists' failure to code cards. Defendant Williamson then gave plaintiff a disciplinary document.

8. On January 9, 1986, defendant Quinn was informed of the incident of January 8. He "appeared to indicate" that he and defendant Welch agreed with the actions of defendants Gary and Williamson.

9. On February 5, 1986, defendant Hailur attempted to get plaintiff to sign a document concerning his job responsibilities.

10. On February 19, 1986, defendant Johnson accused plaintiff of being incompetent.

11. On February 21, 1986, defendant Johnson suspended plaintiff, and defendant Welch confirmed the suspension.

12. Defendant Stewart is the Assistant Administrator of Finance for defendant Suburban, and defendant Green is defendant Welch's supervisor.

As relief, plaintiff seeks compensatory and punitive damages in the amount of $100 million from defendant Suburban and in the amount of $15 million from each of the other defendants. Plaintiff also requests that defendant Suburban be held responsible for all future damages that he and his unborn children may suffer as a result of his work with carcinogens.

As grounds for dismissal, the defendants contend that, considering the jurisdictional bases propounded, plaintiff has failed to state a claim upon which relief may be granted. A large part of the difficulty in interpreting plaintiff's complaint is that he has not set forth precisely which conduct he complains of violated which federal statutory or constitutional protection.

Plaintiff first claims that the defendants have violated his rights under 42 U.S.C. § 1983. Section 1983 only applies to actions taken "under color of" state law. Defendants assert that plaintiff's complaint should be dismissed because he has not alleged that the defendants were state actors. It is clear that *pro se* complaints must be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21, *reh'g denied*, 405 U.S. 948 (1972). Thus, it should be presumed that a *pro se* plaintiff alleges all statutory prerequisites, including that the defendants were acting under color of state law. The onus is then on the defendants to come forward and present evidence that they were not state actors. Defendants' one sentence assertion in their motion that Suburban is a private corporation is not sufficient to meet the defendants' burden. Affidavits from the parties that they were not acting under color of state law at any time relevant to the instant claim are necessary. Therefore, the defendants' motion to dismiss as to § 1983 will be denied at this time, and they will be given twenty days to file a motion for summary judgment with appropriate supporting documents.

On the other hand, the undersigned cannot determine from the complaint the facts plaintiff is relying on to support his claim under §

1983. Accordingly, plaintiff will be given twenty days from the date of the attached order to set forth with particularity the facts which serve as a basis for his § 1983 claim and the federal rights he feels were violated.

Secondly, plaintiff contends that defendants violated 42 U.S.C. § 1985(3), which provides:

> If two or more persons in any state or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the parties so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court held that, to maintain action under the statute, the plaintiff

> must allege that the defendants did (1) "conspire . . ." (2) "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Id. at 102-03. The Court stated that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102 (footnote omitted). However, it reserved the question of what discriminatory factors other than race would be actionable under §1985(3). *Id.* at 102 n.9. In a recent case, *United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, *reh'g denied*, 464 U.S. 875 (1983), the Supreme Court found that

§ 1985(3) did not "reach conspiracies motivated by economic or commercial animus." *Id.* at 838.

In the instant complaint, plaintiff has failed to clearly and concisely plead facts relative to each element of a § 1985(3) claim. Again, because of the requirement that *pro se* complaints be construed liberally and because particularization is preferred over dismissal of *pro se* actions, *Coleman v. Peyton*, 340 F.2d 603, 604 (4th Cir. 1965), plaintiff will be given twenty (20) days to present facts in support of each element of his § 1985(3) claim.

Plaintiff's third allegation is that the defendants violated his rights under the Fifth and Fourteenth Amendments. However, unless the defendants are federal (Fifth Amendment) or state (Fourteenth Amendment) actors, they cannot be sued directly under those constitutional amendments. As with plaintiff's § 1983 claim, the defendants must affirmatively plead and present affidavits that they are not federal or state actors. Moreover, plaintiff has again failed to specifically state the factual basis for these contentions. Therefore, the defendants will be given twenty (20) days to file a motion for summary judgment with appropriate supporting documents, and plaintiff will be given twenty (20) days to particularize his claim.

Next, plaintiff asserts that the defendants violated his rights guaranteed by 42 U.S.C. § 1981. That statute provides that all persons, regardless of race, shall have equal rights under the laws. Its protections have been determined to apply to instances of racial discrimination in private employment. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975). *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir) *cert. denied*, 429 U.S. 920 (1976); *Moore v. Inmont*, 608 F.Supp. 919, 925 (W.D.N.C. 1985); *Hudson v. Charlotte Country Club, Inc.*, 535 F.Supp. 313, 315. (W. D.N.C. 1982). In order to state a claim under § 1981, a plaintiff must "offer evidence showing a discriminatory animus by the defendant in terminating the employment," *Moore*, 608 F.Supp. at 927, or as a factor in the employment situation complained of. In the instant case, plaintiff has not specifically alleged what acts of the defendants he considers to have been the products of race discrimination. Plaintiff will therefore be given twenty (20) days to particularize his claim under § 1981.

Plaintiff's fifth claim is that the defendants have violated his rights under 42 U.S.C. § 1982, which provides that all persons "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The statute prohibits racial discrimination in the sale, leasing, and inheritance of real and personal property, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 421-22 (1968), and has been held not to apply to employment discrimination claims *Abel v. Bonfanti*, 625 F.Supp. 263, 269 (S.D.N.Y. 1985); *Evans v. Meadow Steel Products, Inc.*, 572 F.Supp. 250, 253 (N.D.Ga. 1983); *Johnson v. Duval County Teachers Credit Union*, 507 F.Supp. 307, 310 (M.D.Fla. 1980); *Foreman v. General Motors Corp.*, 473 F.Supp. 166, 177 (E.D.Mich. 1979); *Krieger v. Republic Van Lines*, 435 F.Supp. 335, 338 (S.D.Tex. 1977). Therefore, it will be recommended that the defendants' motion to dismiss be granted as to claims under 42 U.S.C. § 1982.

Sixthly, plaintiff asserts a cause of action for employment discrimination under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* Section 2000e-5(e) indicates that a charge of employment discrimination shall be filed with the Equal Employment Opportunity Commission [EEOC] within 180 days after the allegedly unlawful practice has occurred. However, if state proceedings are instituted, then the charge must be filed within 300 days of the conduct complained of or within thirty (30) days after termination of the state proceedings. Only after a claim is presented to the state agency and/or the EEOC and the appropriate action is taken at that level, may a civil suit be filed. See 42 U.S.C. § 2000e-5(f)(1). In the instant case, there is no evidence that plaintiff has filed an administrative claim with either the EEOC or the State of Maryland. He is therefore precluded from pursuing a Title VII action in this court. Accordingly, it will be recommended that plaintiff's claim under Title VII be dismissed.

Finally, plaintiff seeks damages for exposure to carcinogens and breach of contract. As to the harmful exposure claim, plaintiff has not alleged the jurisdictional and factual bases or the damages he has actually suffered. He has also set forth neither the relevant facts nor the jurisdictional basis of the breach of contract cause of action. Thus, plaintiff will be given twenty (20) days to particularize these claims.

The plaintiff should be advised that failure to particularize as ordered may result in dismissal of his claims. Considering the clarification of claims still required by plaintiff, his motion to compel discovery will be denied without prejudice, and defendants' motion for protective order will be granted.

Accordingly, for the foregoing reasons, it is this 27th day of February, 1987, by the United States District Court for the District of Maryland, ORDERED:

1. That, within twenty (20) days of the date of this order, defendants file a motion for summary judgment with necessary supporting documents relevant to plaintiff's claim under U.S.C. § 1983;
2. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his 42 U.S.C. § 1983 claim;
3. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his 42 U.S.C. § 1985(3) claim;
4. That, within twenty (20) days of the date of this order, defendants file a motion for summary judgment with necessary supporting documents relevant to plaintiff's claim under the Fifth and Fourteenth Amendments;
5. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his Fifth and Fourteenth Amendment claims;
6. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his 42 U.S.C. § 1981 claim;
7. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his claims for harmful exposure and breach of contract and the jurisdictional bases therefore;
8. That plaintiff's motion to compel BE, and the same hereby IS, DENIED without prejudice;

9. That defendants' motion for protective order BE, and the same hereby IS, GRANTED;

10. That Clerk of Court shall mail copies of the foregoing Memorandum and Order to plaintiff and counsel for the defendants.

DANIEL E. KLEIN, JR.
United States Magistrate

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES GEORGE WALKER

v.

SUBURBAN HOSPITAL ASSOC., et al.

Civil Action No. JH-86-962

MAGISTRATE'S REPORT AND RECOMMENDATION

On March 24, 1986, plaintiff filed this *pro se* civil action against Suburban Hospital Association and ten other named defendants. On February 27, 1987, Magistrate Klein stated that he would recommend the dismissal of two of the plaintiff's nine claims (42 U.S.C. Section 1982 and Title VII of the Civil Rights Act). In addition, Magistrate Klein ordered the plaintiff to particularize his claims and ordered the defendants to file a motion for summary judgment based on plaintiff's 42 U.S.C. Section 1983, fifth amendment and fourteenth amendment claims. The parties have complied with that order and, for the reasons that follow, it is recommended that all of the plaintiff's claims either be dismissed or judgment entered for defendants.

Defendants, in their motion for partial summary judgment, argue that plaintiff's claims based on 42 U.S.C. Section 1983 and the fifth and fourteenth amendments must fail because they lack an essential ingredient - namely, state action. The defendants make clear, in their memorandum and supporting affidavit, that Suburban Hospital is a private, non-profit corporation managed by a Board of Trustees whose members are all private citizens. The individually named defendants in this action are all private citizens and were employees of the Hospital for all times relevant to this action.

The plaintiff argues that the Hospital's receipt of federal funds makes it a "federal actor" and thus brings its actions within the

parameters of the challenged claims. The caselaw, however, leads to a different result. While it is true that the Hospital has participated in the federal Hill-Burton Act construction program, 42 U.S.C. Sections 291 *et* seq. (1974), and has received as a result federal funding, it has been expressly held that such funding does not transform the defendant into a state or federal actor. *Modaber v. Culpeper Memorial Hospital. Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982). *See also Carter v. Norfolk Community Hospital Association*, 761 F.2d 970, 972 (4th Cir. 1985).

Furthermore, the fact the hospital accepts patients whose medical care is paid partially, or in full, through medicare or medicaid, is also of no consequence. *Modaber*, 674 F.2d at 1026-27. In *Traegesser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), the appeals court upheld the district court's dismissal of that plaintiff's Section 1983, fifth and fourteenth amendment claims because the receipt of medicare and medicaid funds was found not to fulfill the state action requirement of those claims. It is therefore recommended that this Court enter judgment for the defendants on the claims under Section 1983 and the fifth and fourteenth amendments.

Next, plaintiff's 42 U.S.C. Sections 1981 and 1985(3) claims are based on the alleged acts of the defendant which the plaintiff states are the product of race discrimination, the latter claim involving a conspiracy. There is a line of cases from this court holding that Title VII provides the exclusive remedy for employment discrimination claims. *Keller v. Prince George's County Department of Social Services*, 616 F. Supp. 540 (D.Md. 1985); *H.R. v. Hornbeck*, 524 F. Supp. 215 (D.Md. 1981); *Frye v. Grandy*, 625 F. Supp. 1573 (D.Md. 1986), and *Ryan v. Towson State University et al.*, Civil No. H-83-1571 (October 10, 1985) (a copy of which is attached hereto). Support for these cases may be found in the Supreme Court's decision in *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 99 S. Ct. 2345, 60 L.Ed.2d 957 (1979). In that case, the Court held that 42 U.S.C. Section 1985(3) could not be invoked to redress a violation of Title VII of the 1964 Civil Rights Act. To allow a Section 1985(3) claim to proceed based on Title VII, the Court found, would circumvent Congress' efforts to set up a specific set of remedies and procedures for dealing with such claims.

This same reasoning applies to Section 1981 claims based on violations of Title VII. *See Ryan*. Caselaw from other jurisdictions also compels the same result. *See Tafoya v. Adams*, 612 F. Supp. 1097, 1102 (D.Colo. 1985) and *Parson v. Kaiser Aluminum Chemical Corp.*, 727 F.2d 473, 475 (5th Cir. 1984). Thus, because plaintiff's Section 1981 and Section 1985(3) claims are based upon the same allegations as was his Title VII claim (which Magistrate Klein recommends be dismissed for failure to exhaust administrative remedies), it is recommended that those claims also be dismissed.

Finally, all that remains are plaintiff's tort and breach of contract claims. In response to Magistrate Klein's order of February 21, 1987, the plaintiff filed a memorandum setting forth this Court's alleged jurisdictional basis for those claims. These allegations, however, are insufficient. Regarding the contract claim, plaintiff alleges that this Court has jurisdiction under the contract clause. This clause, contained in Article I, Section 10, clause 1, states, in pertinent part, that "[n]o State shall . . . pass any . . . law impairing the obligation of contracts . . .." The clause, relied on frequently by the Supreme Court during the substantive due process era, has absolutely no application to plaintiff's complaint. The contract clause is a limit upon the *State*, not private actors and not, most importantly, any of the named defendants. Regarding the tort claim, the plaintiff has failed to set out any jurisdictional basis under which this Court may decide the claim. Thus, it is recommended that the contract and tort claims both be dismissed for lack of jurisdiction.

Therefore, for the foregoing reasons, the undersigned respectfully recommends that plaintiff's claims based on 42 U.S.C. Sections 1981 and 1985(3), as well as the contract and tort claims, be dismissed. It is further recommended that partial summary judgment be granted for the defendants on the claims based on 42 U.S.C. Section 1983, and the fifth and fourteenth amendments. Finally, it is recommended that plaintiff's 42 U.S.C. Section 1982 and Title VII claims be dismissed for the reasons set out in Magistrate Klein's Memorandum and Order of February 21, 1987.

DEBORAH K. CHASANOW
United States Magistrate

Dated: April 29, 1987

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES GEORGE WALKER

v.

SUBURBAN HOSPITAL ASSOCIATION, et al.

Civil Action No. JH-86-962

MAGISTRATE'S REPORT AND RECOMMENDATION

This case has been referred to the undersigned for disposition of all discovery disputes and recommendations for disposition of motions to dismiss and/or for summary judgment. Plaintiff alleges racial discrimination based on 42 U.S.C. § 1981[1] and asserts tort and contract claims.[2] Currently before the court is defendants' motion for summary

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[1] Plaintiff originally alleged discrimination under 42 U.S.C. §§ 1981, 1982, 1983, and 1985; the fifth and fourteenth amendments; and Title VII of 42 U.S.C. § 2000e. (Paper No. 3). By order of May 22, 1987, plaintiff's §§ 1981, 1982, 1985, and Title VII claims were dismissed; partial summary judgment was granted to defendants on the § 1983 and fifth and fourteenth amendment claims. Plaintiff appealed to the Fourth Circuit. Remand was ordered as to the § 1981 claim based on *Keller v. Prince George's County*, 829 F.2d 952 (4th Cir. 1987), which was decided after this court's ruling. That case held that the filing of a Title VII claim does not preempt an employment discrimination claim brought under § 1981.

[2] The Fourth Circuit referred to these as pendent state law claims and remanded them along with the § 1981 claim. Plaintiff, however, made the contract claim under Article VI of the United States Constitution and asserted no jurisdictional basis for the tort claim (Paper No. 22), despite specific instructions to do so. (Paper No. 21 at 8). Thus, this court's earlier dismissal was predicated on a lack of a federal jurisdictional basis. (Papers No. 28 and 25). Nevertheless, given the Fourth Circuit's construction of these as pendent state claims, they are treated as such herein.

judgment and plaintiff's opposition to it. For the reasons that follow, it is respectfully recommended that the defendants' motion for summary judgment be granted as to the § 1981 claims. Dismissal of the pendent state claims is recommended as well as one does not meet the test for exercise of pendent jurisdiction and, further, the court need not exercise jurisdiction over pendent claims after disposing of the federal claim prior to trial.

Named as defendants in this suit are Suburban Hospital Association, Joan Finerty, Paul Quinn, James Gary, Bernadette Welch, Charles Stewart, Lloyd Greene,[3] Dalton Williamson, Eric E. Johnson, Heidi Christl Marchand, and Aester Hailu. Plaintiff's § 1981 claims, as set out in his amended complaint, are somewhat unclear. (Paper No. 3). Defendants identify three areas of alleged discrimination: (l) Plaintiff was paid a lower starting salary than other pharmacists because he is black; (2) plaintiff received a lower shift differential than other pharmacists because he is black; and (3) plaintiff's suspension amounted to a discriminatory or constructive discharge. To these, the undersigned would add what is commonly referred to as a "work rule" claim. Plaintiff alleges that he was disciplined for engaging in prohibited conduct while similarly situated non-minority employees were not disciplined, or were less severely disciplined.

The Fourth Circuit has said the following about summary judgment:

> Summary judgment is proper only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts. *Morrison v. Nissan Motor Co.*, 601 F.2d 129, 141 (4th Cir. 1979); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). The party seeking summary judgment carries the burden of showing that there is no genuine issue as to any material fact in the case. Fed. R. civ. P. 56(c); *Char-*

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[3] Although Lloyd Greene is not named in defendants' motion for summary judgment, this seems to be a mere oversight. Section D of defendants' motion asks for dismissal of the individual defendants. (Paper No. 78, p.42). Defendant Green is discussed along with defendants Finerty and Stewart. (Id. at 43). Therefore, it is recommended that defendant Greene be given an opportunity to join the motion formally.

> *bonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). When determining whether the movant has met its burden, the court must assess the documentary materials submitted by the parties in the light most favorable to the nonmoving party. *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 595 (4th Cir. 1985).

Pulliam Inv. Co. Inc. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987). Since plaintiff bears the burden of proof in the instant case, it is his responsibility to confront the defendant's motion for summary judgment with an affidavit or other similar evidence. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court stated:

> In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Id. at 324. With these standards in mind, the inquiry may turn to the substance of plaintiff's allegations. As will be discussed below, there is no dispute as to the material facts in the instant case. The affidavits and exhibits submitted by defendants both soundly rebut plaintiff's meager attempt to establish a *prima facie* case of racial discrimination and conclusively establish legitimate non-discriminatory reasons for his salary and eventual dismissal. On the other hand, plaintiff has failed to confront the defendants' motion for summary judgment with an affidavit or other similar evidence of his own. Plaintiff's unsupported allegations therefore cannot stand.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court outlined the general requirements for establishing a *prima facie* case of employment discrimination in hiring under Title VII. The plaintiff must show (i) that he belongs to a racial minority;

(ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. Id. at 802. That formula was:

> never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). While the test as enunciated in *McDonnell* applied to discriminatory hiring, the general principles are applicable to any employment discrimination case, including claims brought under § 1981. *Lewis v. Central Peidmont Community College*, 689 F.2d 1207, 1209 n.3 (4th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (citations omitted). In general terms, the test requires the plaintiff to prove that he is a member of a protected class and that the defendant treated him less favorably than similarly situated non-minority employees in circumstances from which intentional discrimination can be inferred. *Hervey v. City of Little Rock*, 787 F.2d 1223, 1231 (8th Cir. 1986) (citation omitted). A *prima facie* case of disparate treatment may be established without direct evidence of discriminatory intent. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The *McDonnell Douglas* standard for a *prima facie* case is satisfied if the plaintiff presents:

> proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not those actions were bottomed on impermissible considerations.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 579-80 (1978). If the court concludes that the plaintiff has presented a *prima facie* case, the defendant is given an opportunity to introduce evidence showing a legitimate non-discriminatory reason for its action, but it need not prove that it was actually motivated by the proffered reason. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). The plaintiff is then afforded an opportunity to prove that the

defendants' proffered reason was a pretext for discrimination. *Burdine*, 450 U.S. at 256. However:

> The order of proof mandated by *McDonnell Douglas* does not require that evidence be produced in a compartmentalized form. Thus, plaintiff's evidence relevant to the issue of pretext can be as part of plaintiff's initial evidence which seeks to establish a *prima facie* case.. . . Likewise, defendant's evidence may be properly employed to both undermine plaintiff's ability to establish a *prima facie* case and to show that plaintiff was terminated for a legitimate nondiscriminatory reason.

McClain v. Mack Trucks, Inc., 532 F.Supp. 486 (E.D.Pa. 1982) (*citing Worthy v. United States Steel Corp.*, 616 F.2d 698, 701 (3d Cir. 1980)). Finally, to sustain a claim under § 1981, the plaintiff must prove discriminatory intent.[4] *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 n.16 (1984); *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986), *reh'g. granted on other grounds*, 108 S.Ct. 1419 (1988).

Salary Claims

1. Starting Salary

Plaintiff's allegations that he was paid a lower starting salary than white pharmacists who were hired after him are contained in paragraphs 6-12 and 27 of his amended complaint. (Paper No. 3).

Defendant points to the standard applied in *Witten v. A.H. Smith & Co.*, 36 FEP 271 (D.Md. 1984), to show that plaintiff has failed to meet his burden of presenting a *prima facie* case of discrimination. That case involved a plaintiff who alleged discrimination against him

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[4] In plaintiff's response to defendants' motion for summary judgment, he states that discrimination actions under 42 U.S.C. § 1981 can be based on disparate treatment or disparate impact and cites *Ingram v. Madison Square Garden Ctr. Inc.*, 482 F.Supp. 414 (S.D.N.Y. 1979). (Paper No. 80, p.2). That case was decided prior to the Supreme Court decision in *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 390-91 (1982), in which the Court concluded that § 1981 can only be violated by purposeful discrimination and does not reach disparate effects alone. Thus, while evidence of disparate impact may be relevant to a § 1981 claim, such evidence is insufficient by itself to make out such a claim.

on the basis of race in the setting and payment of salaries, benefits, and other terms and conditions of employment. Judge Miller applied a modified version of the standard requirements for a *prima facie* case under *McDonnell Douglas*. Adapting that test for this case, plaintiff would have to show: (1) That he is a member of a protected class; (2) that plaintiff and non-members of the class worked for the defendant in similar capacities; and (3) that plaintiff was given a lower initial rate of pay or was paid a lower night differential than similarly situated non-members of the class. Id. at 273. Plaintiff is a black male, therefore, requirement no. 1 is satisfied. Regarding his salary claim, plaintiff has failed to show that he was similarly situated to the white pharmacists who were hired after him and who received higher salaries. On the other hand, defendants' submissions show that the pharmacists who were started at higher salaries than plaintiff had more hospital experience and/or higher educational qualifications than he. (Paper No. 78, pp. 31-36 and Exhibit A, Affidavit of Bernadette Welch and attachments thereto).[5] This showing may be used either to thwart plaintiff's attempt to show that he was similarly situated to those individuals, or to provide a legitimate, nondiscriminatory reason for the setting of salaries.

In her affidavit, Ms. Welch describes the criteria used for setting starting salaries for new employees. When hiring pharmacists, the hospital looked for licensed pharmacists with a hospital background who were experienced in compounding IVs, TPN mixing, and with the unit dose ("UD") system. This is reflected in copies of the ads that were run in the Washington Post on March 4 and 11, 1984. (Exhibit A and Attachment 1). Ms. Welch credited the plaintiff with three months hospital experience because his experience as a hospital pharmacist was limited to working as the weekend pharmacist at Capital Hill Hospital from December 1983 to March of 1984. Plaintiff's application also reflects that he worked at Providence Hospital from September of 1980 through March of 1984 as a pharmacy technician. This experience was not credited because it was not pharmacist experience. (Exhibit A at 2 and Attachment 2). Ms. Welch

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[5] Bernadette Welch is identified in her affidavit as the Director of Personnel at Suburban Hospital while plaintiff was employed there. Although the exhibits attached to Ms. Welch's affidavit have not been individually authenticated, she refers to the contents of these exhibits in her affidavit. (Exhibit A).

further states that when plaintiff complained in January of 1986 that he was not being paid a salary comparable to that of white pharmacists, she reviewed the salaries of all pharmacists hired subsequent to the plaintiff. Her investigation revealed that in each case but one, those pharmacists had considerably more hospital experience than the plaintiff and several had advanced degrees in pharmacy studies. (Exhibit A at 3-4). Further, the one pharmacist who was paid a lower salary than Mr. Walker, John Dorcas, who was also black, had no hospital experience as a pharmacist. (Id. at 4 and Attachment 11). Ms. Welch also notes that two minority pharmacists, one Asian and one black, were receiving higher salaries than some white pharmacists. (Exhibit A and Attachments 4 and 12). Thus, the plaintiff fails to make out a *prima facie* case of discrimination based on lower salary. Moreover, even if it were assumed that a *prima facie* case were made simply by showing that plaintiff received a lower salary than other pharmacists, the defendants' affidavits and attachments successfully rebut plaintiff's allegations of discrimination by putting forth legitimate non-discriminatory reasons for the differences, namely the differing experience and educational levels.

Plaintiff, on the other hand, does not successfully establish that these reasons are a pretext. His response to defendants' motion for summary judgment is not accompanied by an affidavit, nor is it made in accordance with 28 U.S.C. § 1746. In paragraph 18, entitled "Miscellaneous Points," plaintiff attempts to rebut defendants' evidence. (Paper No. 80, paragraph 18, A-I). These remarks will be addressed in order:

A. "The advertisement for the night pharmacist did not indicate the amount of hospital experience." While this statement may be true, it does not prove discrimination. Ms. Welch states that hospital policy on salaries was to award higher starting salaries to employees with more experience. This is an entirely reasonable manner of setting starting salaries and is a common practice in the business world.

B. "The affidavit of Defendant Welch does not indicate that Barbara Dowd had a Maryland Pharmacy License before being hired by Suburban." Again, plaintiff's statement is true, but it does not address the relevant question. The affidavit does state that "Ms. Dowd held a pharmacy license from Ohio but did not begin work at Suburban

until she had made application to convert her Ohio license to a Maryland license." (Exhibit A at 3). Thus, plaintiff's attempt to make it appear that Ms. Dowd was not a qualified candidate because she did not have a Maryland license, yet was paid a higher rate than he, must fail.

C. "It appears that the salaries of Eric Johnson and Dalton Williamson are the same. Yet Williamson was supposed to be the Supervisor of Eric Johnson." Not only does this not indicate discrimination against the plaintiff, but also, because Eric Johnson was white and Dalton Williamson was black, that would tend to support the defendants' claim that their salary policies were race neutral.

D. "Neither the Statement of Dalton Williamson nor the Statement of Daniel Yirenkyi are notarized." While they are not notarized statements, both were made under penalty of perjury and therefore are in accordance with 28 U.S.C. § 1746. (Exhibits B and C). Furthermore, neither statement is relevant to the issue of salary.

E. "The value of plaintiff's legal training was praised in an evaluation of him at Suburban." Whether or not this is true, it does not change the fact that legal training is not related education as it is applied by the defendant in setting starting salaries for pharmacists. (Affidavit of B. Welch, Exhibit A at 2).

Point F is not related to plaintiff's claim of discrimination based on salary and will not be addressed here. The relevance of Points G and H is murky and will be tangentially discussed below.

I. "Marchand received her Pharmacy Degree in 1982. James G. Walker received his pharmacy degree in 1982." Once again, plaintiff may be making a true statement, but he does not go far enough in his consideration of the facts. While defendant Marchand may have received her bachelor's degree in 1982, she went on to earn a Doctor of Pharmacy degree in 1984, and had one year of staff experience as a pharmacist. (Exhibit A at 5, and Attachment 16). Thus, a higher starting salary is justified in view of defendant Marchand's qualifications. In his amended complaint, plaintiff cites the fact that defendant Marchand was given a retroactive pay raise as one indication from which we may infer discrimination in the setting of salaries. However, this is also rebutted in the Affidavit of Bernadette Welch. Dr. Marchand was assigned as a clinical pharmacist coordinator at the hospital.

The subsequent adjustment in pay was made in connection with this change in title. (Exhibit A at 5). The closest plaintiff comes to discussing this is in point H where he states "if Marchand worked as a 'clinical pharmacist' without a Pharm D. degree means that a Pharm D. is not necessary to work as a 'clinical pharmacist.'" Point G makes a similar statement regarding pharmacy experience as related to advancement. Neither remark supports a finding of discrimination.

Plaintiff cites two cases to support his claim of salary discrimination. The first case is *McDaniel v. Board of Public Instruction for Escambia County, Fla.*, 39 F.Supp. 638 (N.D.Fla. 1941). This case involved claims brought under the fourteenth amendment due process and equal protection clause against the State of Florida for paying black teachers and principals lower salaries than white teachers and principals. The court held that where the plaintiffs had equal qualifications and experience, the discriminatory practice was a violation of the fourteenth amendment rights of plaintiffs. The second case is *Hishon v. King*, 467 U.S. 69 (1984). This case provides an employer may not discriminate in the terms, conditions, or privileges of employment. "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion . . .," id. at 75. (Plaintiff's arguments on salary). There is nothing in either case to contradict the reasoning set forth above. Plaintiff has failed to show that he was similarly situated with those who received higher starting salaries.

Based on the above, it is respectfully recommended that the defendants' motion for summary judgment be granted in relation to the charge of discrimination in setting initial salaries.

2. Differential for Night Shift

The record is somewhat muddled regarding the claim of discrimination in the amount of night differential paid. In his amended complaint, at paragraph 26, the plaintiff states that he "was not paid night differential pay: others were." (Paper No. 3). In his response to defendants' motion for summary judgment, plaintiff reiterates this claim. (Paper No. 80, paragraph 15). Further, plaintiff points to defendants' answer to the amended complaint, paragraph 26, where the defendants admit the allegations contained in paragraph 26 of the amended complaint. (Paper No. 36, paragraph 26). Plaintiff's deposi-

tion, however, presents a very different contention. There he stated that he did receive some shift differential and that registered nurses received a higher night differential than did pharmacists. (Plaintiff's Deposition, p.61, Appendix to Memorandum of Law in Support of Defendants' Motion for Summary Judgment). It is apparent from his deposition that this is the discrimination he is referring to. Plaintiff stated "[w]e both have licenses from the State of Maryland. *I only get $1.35* and they get more money." (Id., lines 20-21) (emphasis added). And, when asked if it was his claim that other night shift pharmacists received a higher night shift differential than he did, the plaintiff responded, "I don't think that I ever stated that. I stated that the nurses received night shift differential and I did not." (Id. at 64, lines 14-16). Thus, the plaintiff has contradicted his own allegations in his deposition. In light of this, it would not be in the best interest of justice to hold defendants to their admission in their answer to plaintiff's amended complaint. No purpose would be served in taking this issue to trial. By no stretch of the imagination can plaintiff establish a genuine dispute of material fact sufficient to preclude summary judgment. A genuine issue of fact precluding summary judgment is one that can be maintained by substantial evidence. *Mack v. W.R. Grace Co.*, 578 F.Supp. 626, 630 (N.D.Ga. 1983). Further:

> [i]n ruling on the motion for summary judgment, the court may not decide issues of fact.. . . The plaintiff and the defendants motions for summary judgment must be reviewed independently, . . . and in the case of each, all reasonable doubts about the facts are to be resolved and all inferences from the facts are to be drawn in favor of the party opposing the motion.. . . The party opposing the motion for summary judgment need not respond to it with affidavits or other evidence until the moving party carries its burden of showing that no material fact is in dispute.. . . Once the moving party makes convincing showing, however, the opposing party must demonstrate by receivable facts that a real controversy exists.. . . At that point mere allegations unsupported by evidence cannot defeat summary judgment.

(Id.) (citations omitted). Even when the evidence is viewed in the light most favorable to this plaintiff, this burden is not satisfied.

In defendant Welch's affidavit, she states that the plaintiff was paid a shift differential of $1.35 because he was to work on the night shift and that that differential was the same as that paid to other pharmacists on the night shift. She cites Greg Petzold, a white pharmacist, as an example of a night pharmacist who also received $1.35 as a night shift differential. Attachment 3 to her affidavit is Mr. Petzold's employment application. On page 4, the amount of his shift differential is stated to be $1.35. This is the same as is shown on the plaintiff's application. (*See* Exhibit A, Attachment 2). Furthermore, Robert Jackson also received the same shift differential. (Exhibit A, Attachment 13). The only pharmacists whose applications indicate that they received a higher shift differential were Melissa McGowan, Patricia Delk, and John Dorcas. The applications of these three pharmacists indicate that they were to receive $1.41 in shift differential. On two of the applications, those of Delk and Dorcas, it was indicated that they would be working the evening shift. It is therefore logical to assume that Melissa McGowan was receiving $1.41 because she also was working the evening shift. (Exhibit A, Attachments 5, 7, and 11). The record is replete with references that establish that plaintiff worked the night shift. Therefore, he was not similarly situated to pharmacists working the evening shift. A difference in differentials that is based on different shifts cannot be considered discriminatory. Therefore, the plaintiff cannot prove discrimination in the amount of shift differential he received insofar as the other pharmacists are concerned. Moreover, nurses and pharmacists, while they are both licensed by the State of Maryland, are not performing the same duties and cannot be considered similarly situated. Defendant Welch's Affidavit sets forth a legitimate non-discriminatory reason for the difference in shift differential paid to RN's and LPN's. The hospital was having difficulty recruiting sufficient numbers of nurses to work the night shift, hence, the increase in night shift differential for these personnel. (Exhibit A at 2). Defendant Welch also mentions the fact that night pharmacists were paid for 80 hours of work in each two-week period when they actually only worked 70 hours. This was done to provide a premium for those who worked the night shift. (Id.)

Thus, plaintiff has failed to satisfy his burden as to the claim of discrimination in night differential. It is respectfully recommended

that the defendants' motion for summary judgment be granted as to this claim.

Disciplinary Measures

In a discriminatory discipline claim, the respective burdens on the parties are as set out above. A plaintiff may make out a *prima facie* case by circumstantial evidence either by showing that his conduct did not merit the discipline or by showing that others of a different race were not disciplined as severely for similar misconduct. A defendant may rebut by articulating a legitimate, non-discriminatory reason for the discipline. Once an employer articulates such a reason, plaintiff then has the burden to show that the reasons offered by the employer were but a pretext for discrimination. At all times, plaintiff retains the ultimate burden of persuading the court that he has been a victim of intentional discrimination. *Moore v. Inmont Corp.*, 608 F.Supp. 919, 926 (D.C.N.C. 1985) (Black employee fired for breaching employer's fully published policy prohibiting smoking in particular areas on pain of immediate discharge could not establish that employer's legitimate, non-discriminatory reason for the discharge was pretextual).

1. Discharge

The first and foremost reason that plaintiff cannot prove discriminatory discharge is that he was not discharged and his suspension was not a constructive discharge. The general rule on constructive discharge is that, if an employer deliberately makes an employee's working conditions:

> so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.

Young v. Southwestern Savings & Loan Assoc., 509 F.2d 140, 144 (5th Cir. 1975) (citations omitted). There is no indication in the record that this was the case here, nor does Mr. Walker offer evidence to substantiate this in his response to the motion for summary judgment. The one item of evidence that might suggest that approach was plaintiff's testimony at his deposition that another pharmacist, Boki, had been

placed on a seven-day suspension and that, when he returned to work, he was fired. (Plaintiff's Deposition at 192). However, although plaintiff stated that he expected that to happen to him, he further states that he failed to return to work because he felt that Suburban had already breached the contract by the suspension. Plaintiff does refer to another suspension incident that occurred on April 26, 1985, involving the improper preparation of an IV admixture by his supervisor, Eric Johnson, in his response to defendants' motion for summary judgment. (Paragraph 14). He refers the court to "Evidence Document-Report On IV incident 5/3/88," but did not attach that report to his response. (A copy of the report is attached to plaintiff's response to defendants' motion *in limine*. (Paper No. 93)). The report reveals that Mr. Johnson was given a three-day suspension for his involvement in the incident.[6] The fact that the supervisor in question was suspended for three days and yet was on the scene to be the involved in run-ins with the plaintiff shows that he was not fired when he returned from his suspension. Therefore, this would tend to negate the suggestion that a suspension is a mere precursor to termination. Finally, the letters sent to the plaintiff attached to his deposition as attachment 2 state clearly "you are expected to return to work on Monday, March 3, 1986, at 10:00 p.m." Thus, plaintiff has failed to show that the suspension was an attempt to terminate his employment amounting to a constructive discharge.

2. Suspension

A. Pretext

Plaintiff's claim that his suspension was discriminatorily motivated fails in any event. The defendants have successfully set forth a legitimate non-discriminatory reason for that suspension and plaintiff has utterly failed to establish that that reason is but a pretext. The record is replete with evidence of plaintiff's admitted insubordination toward his superiors and his deliberate disregard for hospital policies. For example, when plaintiff was told that he would have to do what his supervisor said, his response was: "I said, in a pig's eye, or something to that effect. It would be coded when you all do it."

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[6] This evidence is the subject of a motion *In limine* and is discussed further below. If this report and recommendation is adopted, then, of course, the motion will be moot.

(Plaintiff's Deposition at 144). Plaintiff also told Dalton Williamson, a supervisor, that he would not take orders from him anymore. (Id. at 210). At least three counseling memos are submitted by the defendants as substantiation for their claim that the plaintiff had been repeatedly reprimanded for insubordination and refusal to perform his duties (exhibits attached to plaintiff's deposition dated January 9, 1986, February 17, 1986, February 20, 1986).[7] At his deposition, Mr. Walker maintained that he considered the counseling memos to be harassment by Dalton Williamson, giving him unnecessary orders and ordering him to do "flunky work." (Id. at 254).

The closest plaintiff comes in attempting to rebut this is a statement in paragraph seven of his response to defendants' motion for summary judgment that the fact that an employee charging race discrimination was replaced with an individual of the same race may not rebut *prima facie* case of discrimination because the replacement may have been made to cover discrimination. He cites *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460 (N.D.Cal. 1978). That statement may very well be true, however, the plaintiff does not offer any evidence as to who replaced him or why this would show that defendants' proof is but a pretext. The plaintiff's only other possible attempt at rebuttal is found in paragraph twelve where he cites to his employment agreement to claim that, by breaching his contract by suspending him without 30 days notice, defendants acted intentionally, maliciously, and in a grossly negligent manner because his contract does not speak of suspension, but rather of 30 days notice.

Even if the employment agreement that the plaintiff refers to as his contract were to be construed as one, it could not support his allegations.[8] (Plaintiff's Deposition, Exhibit 4). The clause Mr.

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[7] The exhibit number of the first deposition exhibit is not clear, but the second and third memos are identified as exhibits 16 and 17.

[8] The employment application filled out by Mr. Walker has a clause above the employee's signature that provides:

> I understand that nothing contained in this application or in the granting of an interview is intended to create an employment contract between Suburban Hospital and myself for employment or the providing of any benefit. No promises regarding employment have been made to me, and I understand that no such promise or guarantee is binding upon the

Walker refers to when he says that Suburban Hospital is required to give him 30 days notice before suspending him is paragraph seven. That paragraph reads: "Suburban Hospital reserves the right to discontinue this type of scheduling. If this type of scheduling is to be discontinued, the hospital will give the employee a minimum of 30 days notice'." The scheduling being referred to is found in paragraph one which reads: "I will work an alternating work week schedule consisting of seven (7) consecutive ten (10) hour night shifts on duty and the next seven (7) consecutive nights off duty." The only other paragraph that has any mention of notice in it is paragraph five, which reads: "If I decide to leave the employment of Suburban Hospital as a night pharmacist, I will give at least 30 days notice prior to my last day of employment." This merely obligates plaintiff to notify his employer if he intends to terminate his employment with Suburban. Thus, plaintiff's claim that Suburban Hospital breached its contract with him because they did not give him 30 days notice that they were going to suspend him cannot stand. Plaintiff has failed to establish that the defendants' stated reasons for the disciplinary actions were but a pretext for discrimination in regard to his suspension/termination.

B. Work Rule

The final claim that can be construed from plaintiff's factual allegations is what is commonly referred to as a "work rule" case. A plaintiff who alleges that he or she was disciplined for engaging in prohibited conduct while similarly situated non-minority employees were not disciplined, states a claim of discrimination. *Moore v. City of Charlotte, N.C.*, 754 F.2d 1100, 1105 (4th Cir. 1985). In order to demonstrate a *prima facie* case of this type of discrimination, plaintiff must prove (1) that he engaged in prohibited conduct similar to that of a person of another race, and (2) that the disciplinary measures enforced against the plaintiff were more severe than those enforced against the other person.[9] The defendants did not specifically address

> hospital unless made in writing. If an employment relationship is established, I understand that I have the right to terminate my employment at any time and that the hospital retains a similar right.

Thus, it would seem that the relationship between the plaintiff and the defendant was an employee at will relationship. There are several copies of the plaintiff's application attached to defendants' submissions. One can be found as deposition exhibit 3, another is attached to the affidavit of Bernadette Welch, exhibit A, as attachment 2.

this argument in their motion for summary judgment. The uncontroverted evidence, however, refutes this claim as well.

Plaintiff claims in his amended complaint that he was disciplined for failing to code cards while other pharmacists who also failed to perform this duty were not disciplined. (Paper No. 3, Paragraph 16). Plaintiff further alleges that Eric Johnson, a white pharmacist and a supervisor, improperly prepared an IV solution resulting in the death of a patient. These two allegations form the basis for plaintiff's work rule claim. In regard to the first argument, even if plaintiff's allegations that other pharmacists were failing to perform the coding duties are true, there is evidence in the record that establishes that plaintiff was not placed on suspension merely for his failure to perform this duty. Rather, it is clear that the plaintiff's insubordination played an important part in his suspension. (See discussion above). Plaintiff makes no allegation in any of his pleadings or in his response to the motion for summary judgment that other pharmacists also blatantly refused to perform these functions or referred to it as "flunky work" as he did; (See Plaintiff's Deposition, p.150-152). Plaintiff does refer in his response to the motion for summary judgment to the Eric Johnson incident. (Paper No. 80, Paragraph 14). It is true that Eric Johnson was somehow involved in such an incident and he was placed on a three-day suspension for that involvement. Moreover, defendant Johnson denied being responsible for the preparation of the mixture and it is unclear whether he was disciplined for preparing the mixture or for failing to report the incident promptly. (Plaintiff's Objections to Defendants' Motion *In Limine*, Attachment 2, p.2). It certainly has not been established that the behavior of Eric Johnson was a more serious breach of hospital regulations or procedures than were plaintiff's actions. The disciplinary action taken against plaintiff in suspending him for three days was not more severe than that assigned to the white pharmacist, Eric Johnson, and plaintiff has not made out a *prima facie* case that he was punished more severely for actions also engaged in by nonminority employees.

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[9] Although *Moore* involved Title VII claims of discrimination, an identical analysis is applied in reviewing disparate treatment claims in 1981 cases. *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1147 (4th Cir. 1986).

The only authority plaintiff cites for the impropriety of defendants' actions involving the IV incident is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). That was a fourteenth amendment case dealing with arbitrary and unjust discrimination on the part of a municipality in its requirements for the establishment of laundries. That case has no application to this claim. Plaintiff has thus failed to establish a *prima facie* case of discrimination based on the work rule theory.

Thus, inasmuch as plaintiff has failed to substantiate his claims that the disciplinary measures taken by defendants were intentionally discriminatory, defendants are entitled to judgment in their favor.

Pendent State Claims

As set out in *United Mineworkers of America v. Gibbs*, 383 U.S. 715 (1966), there is a two-part test for determining when the exercise of pendent jurisdiction is appropriate. First, the court must determine whether it has the power to entertain the pendent claim and, second, whether, in its discretion, the court should entertain the claim.

> A court has power if: (l) there is a federal claim with "substance sufficient to confer subject matter jurisdiction on the court"; (2) the state and federal claims "derive from a common nucleus of operative fact"; and (3) "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding."

Guyette v. Stauffer Chemical Co., 518 F.Supp. 521, 523-524 (D.N.J. 1981) (quoting *United Mineworkers of America v. Gibbs*, 383 U.S. at 725). However, the *Gibbs* Court cautioned that the power of a federal court to entertain a pendent claim "need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Gibbs*, 383 U.S. at 726 (footnote omitted).

> A federal court should exercise its discretion to dismiss pendent State claims l) when "considerations of judicial economy, convenience and fairness to litigants" are not present; 2) when needless decisions of a State law might be made by the federal court and "a surer-footed reading of applicable law" would be made in the State court; 3)

> when "it . . . appears that the State issues substantially predominate, whether in terms of proof, of scope of the issues raised, or of the comprehensiveness of the remedies sought," and the State claim is not closely tied to questions of federal policy; and 4) when there are reasons that are "independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief."

Mason v. Richmond Motor Co., Inc., 625 F.Supp. 883, 889 (E.D.Va. 1986) (quoting *United Mineworkers of America v. Gibbs*, 383 U.S. at 726-727). *See generally* 13B Wright & Miller § 3567.1 (1984); C. Wright, *Law of Federal Courts* § 19 (4th ed. 1983).

Plaintiff's tort claim, if construed as a state law cause of action, does not meet the test for pendent jurisdiction. The factual allegations concern his alleged exposure to carcinogens during his employment at Suburban Hospital. He sues for the speculative possibility that this exposure may cause him to get cancer, or may adversely affect any children he may have in the future. This claim is related to his § 1981 claim only in the remote sense that both claims arise from his employment at Suburban Hospital. This appears to be an insufficient connection to justify the exercise of pendent jurisdiction. This claim should be dismissed without prejudice.

Plaintiff's contract claim, on the other hand, does arise from a common nucleus of fact. This claim has already, in fact, been resolved by recommendations made earlier in this report. Specifically, plaintiff's entire contract claim is based on the erroneous premise that he had a contract with the defendant and that the contract entitled him to 30 days notice prior to suspension. That claim is refuted categorically by the plain language of the documents upon which he relies. Therefore, the court would be entirely justified in granting judgment to the defendants on the contract claim as well.

Alternatively, given that the federal claim is being disposed of prior to trial, the court may be inclined to dismiss the contract claim without prejudice. Several courts have specifically articulated the policy that courts should ordinarily refrain from exercising jurisdiction over pendent state claims when the federal claim is disposed of on a motion for summary judgment, *Buethe v. Britt Airlines, Inc.*, 749

F.2d 1235, 1240 (7th Cir. 1984); *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 194 (3d Cir. 1976). If the court adopts the recommendation that summary judgment be granted in favor of the defendants on the federal claims, dismissal of the pendent state claims would also be within the court's discretion.

Conclusion

For the foregoing reasons, it is respectfully recommended that defendant Greene be given an opportunity to join the motion for summary judgment filed by the other defendants, that defendants' motion for summary judgment on the §1981 and contract claims be granted, and that the tort claim be dismissed without prejudice. (Alternatively, the contract claim may be dismissed without prejudice, as well.)

DEBORAH K. CHASANOW
United States Magistrate

Dated: December 13, 1988